



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 33 OF 2019

RICHARD MUGAA.....APPELLANT/APPLICANT

VERSUS

CYRUS MUTHUI MWAURA.....RESPONDENT

RULING

1. This Ruling relates to the Appellants application dated 11th February 2019 seeking a stay of execution in respect to the Judgement and Order of G.N. Wakahiu (C.M.) dated 31st December 2018 in Maua CMCC No. 186 of 2014 Cyrus Muthui Mwaura versus Richard Mugaa & Anor.

2. The Application is supported by the sworn affidavit of **Richard Mugaa (the applicant)** and on the grounds set out on the face of the application. The applicant avers that the judgement was delivered in the absence of the appellant who was not given a chance to defend himself, that the appeal has strong likelihood of success, that the appellant is apprehensive that the respondent is likely to proceed with execution while the appeal is pending, that the appellant shall suffer substantial loss and that the appeal shall be rendered nugatory if the respondent proceeds with the execution.

3. The application was opposed by **Cyrus Muthui Mwaura** through his replying affidavit dated 12th April 2019 where he avers that there existed a contractual obligation between the Appellant and Respondent and he should therefore be allowed to enforce the Judgment. He further stated that the applicant failed to put a defence in the lower court, and he went on to put an application to set aside the interlocutory judgement on record, but failed to pursue the same hence the interlocutory judgement remained on record. The respondent further contended that the applicant has failed to prove substantial loss if the orders sought are not granted. If anything the Respondent is in fact the one who has incurred loss having developed the suit land in 2004 to 2016 and being evicted from the same by the applicant with no refund.

4. On 27th March 2019 the Court directed parties to canvass the application through written submission. Both parties have filed their respective submissions which I have duly considered.

Analysis and Determination

5. This application invokes the discretionary powers of the court. It is brought under **Order 42 Rule 6 of the Civil Procedure Rules, 2010** which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6(2) as follows:

“No order for stay of execution shall be made under sub-rule (1) unless–

The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Unreasonable Delay

6. The application was filed 41 days after the Judgement of the trial Court was delivered. There was a delay in making the application, but such delay cannot be termed as inordinate.

Substantial Loss

7. The applicant has alluded to his inability to pay the sum issued by the trial Court and particularly the sum awarded for general damages. He has averred that he is not a man of means and there is considerable fear that he shall be subjected to civil arrest if the lower court's

judgment is executed.

8. In **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** the Court referred to the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** where the court held as follows;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

9. The Respondent has not demonstrated his ability to refund the sums awarded if the appeal succeeds. I find that the applicant has established that he will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory.

Security

10. The applicant has not given any indication as to the provision of security, hence the court will make appropriate orders on this point.

11. In the circumstance and in order to do substantive justice to both parties, I proceed to grant the following orders;

1) A stay of execution of the judgment in Maua CMCC NO. 186 of 2004 is hereby granted on condition that the applicant shall deposit a sum of sh. 100 000 into this court as security within a period of 30 days failure to which the order of stay shall lapse.

2) The order of stay shall last for a period of one year ONLY.

3) The applicant is to meet the costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kimathi holding brief for Gikunda for appellant

Karuti holding brief for Mbabu Inoti for respondent

Appellant

HON. LUCY. N. MBUGUA

ELC JUDGE